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September 12, 2011

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2011 SEP 12 PM 1:42
CHIEF CLERKS OFFICE

Via Facsimile and Hand Delivery

Ms. Bridget C. Bohac
Chief Clerk, MC-105
Texas Commission on Environmental Quality
12100 Park 35 Circle, Building F
Austin, Texas 78711-3087

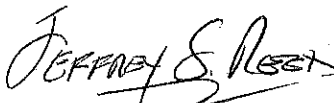
Re: Docket No. 2011-1524-AIR;
Application by J.R. Thompson, Inc. for TCEQ Permit No. 92504L001

Dear Ms. Bohac:

Enclosed please find an original and seven (7) copies of Applicant's Response to the Requests for Contested Case Hearing to be filed in connection with the above-referenced docket. Please file mark a copy and return it to me via our courier delivering same.

Thank you for your assistance in this matter.

Sincerely,


Jeffrey S. Reed

JSR/mpj
Enclosure

cc: Certificate of Service

1366228

TCEQ DOCKET NO. 2011-1524-AIR

2011 SEP 12 PM 1:42

APPLICATION BY	§	BEFORE THE
	§	CHIEF CLERKS OFFICE
J.R. THOMPSON, INC.	§	TEXAS COMMISSION ON
ROCK CRUSHING PLANT	§	
MUENSTER, COOKE COUNTY	§	ENVIRONMENTAL QUALITY
	§	
AIR QUALITY PERMIT NO. 92504L001	§	

**J.R. THOMPSON, INC.'S RESPONSE TO THE
REQUESTS FOR CONTESTED CASE HEARING**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

J.R. Thompson, Inc. ("J.R. Thompson" or "Applicant") files this response ("Response") to the requests for a contested case hearing filed in this matter. J.R. Thompson respectfully requests that the Texas Commission on Environmental Quality ("Commission" or "TCEQ") grant the hearing requests of Ms. Michelle Sandmann, Mr. Kenneth Bierschenk, Mr. Wayne Luttmer, Mrs. Cathy Luttmer, and "Concerned Neighbors of Proposed Rock Crusher" finding that each are affected persons; Applicant also respectfully requests referral of only the twelve (12) issues requested below pertaining to Air Permit (NSR) No. 92504L001 to the State Office of Administrative Hearings.

I. BACKGROUND

J.R. Thompson is proposing to authorize a portable rock crushing facility near Muenster, Cook County, Texas. The proposed facility will produce crushed stone for the construction industry.

J.R. Thompson submitted an application for an air quality new source review permit under the Texas Clean Air Act § 382.0518 to the TCEQ on May 7, 2010. The air permit would

authorize construction of a rock crushing plant consisting of two crushers, one screen, assorted material handling conveyors, and five (5) acres of stockpiled material. The proposed facility would be limited to a maximum operating schedule of 18 hours per day, 7 days per week, 52 weeks per year, with a total hours of operation not to exceed 4,380 hours per year in any rolling 12-month period. Plant throughput would be limited to 500 tons per hour with an annual throughput of no more than 1,000,000 tons per year.

The TCEQ declared the application administratively complete on May 24, 2010. J.R. Thompson published the first notice, or Notice of Receipt and Intent to Obtain an Air Quality Permit on June 11, 2010, in the *Muenster Enterprise*. Second notice, or Notice of Application and Preliminary Decision for an Air Quality Permit, was published on December 17, 2010, in the *Muenster Enterprise*.

The TCEQ Executive Director Staff and the TCEQ Office of Public Assistance held a public meeting on March 3, 2011, at the Muenster ISD Cafeteria in Muenster, Cooke County, Texas. J.R. Thompson representatives attended the public meeting. The public comment period closed on March 3, 2011.

The Executive Director's staff prepared a Response to Comments ("RTC") document that was mailed on July 25, 2011. An additional 30 day comment period then followed, during which the public had another opportunity to file hearing requests and/or requests for reconsideration. Hearing requests were received from Ms. Michelle Sandmann¹ on behalf of herself and "Concerned Neighbors of Proposed Rock Crusher" ("CNPRC"), Mr. Kenneth Bierschenk, Mr. Wayne Luttmer, and Mrs. Cathy Luttmer. Ms. Sandmann's hearing request dated July 9, 2010 does request a hearing on behalf of herself and on behalf of CNPRC, and lists

¹ As official representative of CNPRC, the Applicant is serving the members of CNPRC through Ms. Sandmann.

several members of CNPRC, but does not purport to request a hearing on the members' behalf individually. The TCEQ did not receive any requests for reconsideration.

II. APPLICABLE LAW

The Commission must assess the timeliness and form of the hearing requests, as set forth in 30 Tex. Admin. Code §55.201(c) and (d). To ensure that individual hearing requesters have legal standing to contest this air permit application, the Commission must also determine whether the requests were filed by "affected persons" as defined by Tex. Water Code § 5.115, implemented in 30 Tex. Admin. Code § 55.203. An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application.² An interest common to members of the general public does not qualify as a personal justiciable interest.³ To have a legally sufficient hearing request, groups or associations must meet the requirements under 30 Tex. Admin. Code § 55.205(a).

If the Commission determines that the hearing requests meet the requirements in §55.201 and §55.203, the Commission may then refer those issues that meet the requirements in 30 Tex. Admin Code § 50.115(c), including issues that:

- (1) involve a disputed question of fact;
- (2) were raised during the public comment period; and
- (3) are relevant and material to the decision on the application.²

² 30 Tex. Admin. Code § 55.203(a).

³ Id.

III. ANALYSIS OF HEARING REQUESTS

A. The hearing requests were timely, not withdrawn, and in proper form.

The hearing requests were timely, not withdrawn,⁴ and in proper form in accordance with 30 Tex. Admin. Code §55.201(c). The hearing requests provided proper identification of the requester, identified a personal justiciable interest affected by the application different from the public, and requested a hearing in accordance with 30 Tex. Admin. Code §55.201(d).⁵ Therefore, this analysis will focus on which of the hearing requesters should be considered affected persons.

B. The Commission should find only the hearing requesters to be affected persons.

The final opportunity to request a contested case hearing and request for reconsideration ended on August 24, 2011. Hearing requests were received only from Ms. Michelle Sandmann on behalf of herself and "Concerned Neighbors of Proposed Rock Crusher" ("CNPRC"), Mr. Kenneth Bierschenk, Mr. Wayne Luttmner, and Mrs. Cathy Luttmner. Ms. Sandmann, in her request, represented that twenty-eight (28) individuals including herself are members of CNPRC. However, her request does not purport to request a hearing on behalf of any of the members individually; it specifically states that the request is on behalf of herself and the organization. No individual member of CNPRC should be granted affected person status on the basis of Ms. Sandmann's letter. Thus, only Mrs. Sandmann, Mr. Bierschenk, and Mr. and Mrs. Luttmner are proper hearing requesters and only those people should be granted affected persons status, each on the basis of their own hearing requests. No other member of CNPRC has requested a contested case hearing.

⁴ One hearing request, submitted by Mr. Kenneth Bierschenk on June 16, 2010, was withdrawn on June 17, 2010, but reasserted as a hearing request on June 29, 2010. J.R. Thompson is treating his request as timely and not withdrawn.

⁵ See 30 Tex. Admin. Code §55.201(d)(2), which requires that the hearing requester "identify the person's personal justiciable interest affected by the application...explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application..."

C. The Commission should grant group standing to CNPRC.

Hearing requests by groups or associations typically involve a written request by an organization, naming one or more hearing requesters in close proximity to the proposed facility that meet the criteria for an affected person determination. If an individual member of the group or association is an affected person in his or her own right, then the association or group's hearing request may be granted.

To request a contested case hearing, an organization: (1) must have at least one member meeting the affected person determination; (2) must be seeking to protect interests that are germane to the organization's purpose; and (3) must not require participation of an individual member to assert its claim or the relief it is requesting.⁶

In this case, the group "Concerned Neighbors of Proposed Rock Crusher" ("CNPRC") has submitted a hearing request. CNPRC has identified its members that live within one mile of the proposed facility. CNPRC's hearing request states that it seeks to preserve the health and rural quality of life of its members and the use and enjoyment and natural beauty of its members' property. Subject to later discovery regarding any of the three criteria for organizational standing, CNPRC appears to be an affected person.

D. The Commission should refer certain issues because these issues raise a question of fact, are raised during the comment period, and are relevant and material to the draft permit.

The following issues were raised during the comment period. These issues are relevant and material to the draft air permit. The Applicant recommends that the following issues be referred to SOAH:

1. Whether the draft permit will cause or contribute to a violation of any NAAQS.
2. Whether the proposed facility's emissions will adversely impact the requesters' health.

⁶ See 30 Tex. Admin. Code § 55.205(a).

3. Whether the proposed facility's emissions will cause nuisance conditions.
4. Whether the proposed facility's emissions will adversely impact agricultural operations.
5. Whether air dispersion modeling was accurate and appropriate.
6. Whether correct BACT was applied to the permit.
7. Whether emission points were correctly identified.
8. Whether the facility entrance is correctly identified.
9. Whether proposed monitoring meets TCEQ requirements.
10. Whether the planned operating schedule complies with TCEQ requirements.
11. Whether the draft permit conditions contain adequate monitoring, reporting, and recordkeeping requirements to ensure permit compliance.
12. Whether the facilities are located an appropriate distance from receptors.

E. The Commission should not refer certain issues to SOAH.

The following issues are not relevant and material to the air quality permit and/ or did not raise a disputed issue of fact:

13. Public Notice: Whether public notice (newspaper and/or signage) was sufficient. Each of the requesters received notice and is participating in this proceeding.

14. Water Quality: Whether the proposed operation will adversely impact drinking water, surface and ground water quality, including impacts to Dry Comal Creek. These issues are not relevant and material to this proceeding.

15. Effect on rainwater collection: Whether the proposed operation will adversely impact rainwater collection. This issue is not relevant and material to this proceeding.

16. Quality of Life: Whether the proposed facility's impact on the quality of life in the area should be considered. This issue is not relevant and material to this proceeding.

17. Truck Traffic: Whether the proposed operation will adversely impact traffic, including physical wear and tear on roads. This issue is not relevant and material to this proceeding.

18. Dust from Truck Traffic: Whether the application adequately considers dust from truck traffic on surrounding roads. This issue is not relevant and material to this proceeding.

19. Enforceability: Whether the proposed permit is enforceable. This issue does not raise a disputed issue of fact.

20. Response Time / Enforcement: Whether TCEQ investigators will promptly respond to complaints and whether and how TCEQ will enforce the permit. This issue is not relevant and material to the proceeding.

21. Likelihood of Compliance: Whether the applicant is likely to comply with the permit. This issue does not raise a disputed issue of fact.

22. Inconsistent Statements: Whether the application includes inconsistent statements regarding operations. This issue does not raise a disputed issue of fact in that there were no specific inconsistent statements cited. However, inconsistent statements might be independently relevant evidence in other referred issues.

23. Crusher Relocation: Whether future relocation of the rock crusher on the property should be considered. This issue is not relevant and material to this proceeding.

24. Dust Suppression Chemicals: Whether chemicals used to suppress dust on the site will adversely impact the requester's health. This issue is not relevant and material to this application.

25. Public Access to Monitoring Results: Whether the public will have access to monitoring results. The issue is not relevant and material to this application.

26. Insurance / Bonding: Whether the applicant has provided the appropriate bonds and insurance as required by TCEQ rules. This issue is not relevant and material to this proceeding.

IV. REQUESTS FOR RECONSIDERATION

The TCEQ did not receive any requests for reconsideration.

V. LOCATION AND MAXIMUM DURATION OF THE CONTESTED CASE HEARING

The Applicant recommends the contested case hearing be held in Austin, and last no longer than three (3) months from the preliminary hearing to the proposal for decision.

VI. APPLICANT'S RECOMMENDATION

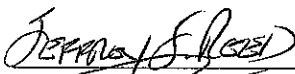
The Applicant respectfully recommends that the Commission:

- A. Find hearing requests to be timely, not withdrawn, and in proper form;
- B. Find that Ms. Michelle Sandmann, Mr. Kenneth Bierschenk, Mr. Wayne Luttmer, Mrs. Cathy Luttmer and "Concerned Neighbors of Proposed Rock Crusher" ("CNPRC") are affected persons, and find that all other hearing requesters are not affected persons in this matter;
- C. Refer issues #1-12 to SOAH, which includes those issues raised during the comment period, and that are relevant and material to the application;
- D. Do not refer issues #13 - 26 to SOAH since these issues do not raise disputed issues of fact and/or are not relevant and material to the draft air quality permit;
- E. Find that the contested case hearing should be held in Austin;
- F. Find that the maximum duration of the contested case hearing should be no longer than three (3) months;

G. Require that the TCEQ Executive Director participate as a party in the SOAH hearing.

Respectfully submitted,

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By: 
JEFFREY S. REED
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ATTORNEYS FOR J.R. THOMPSON, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Applicant's Response to Hearing Requests for Contested Case Hearing and Requests for Reconsideration was served on the following counsel/parties of record by certified mail (return receipt requested), regular U.S. mail, facsimile transmission, email and/or hand delivery on September 12, 2011.

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